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In the Supreme Court of the United States

OCTOBER TERM, 1975

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The questions presented in this case concern the valuation of three tracts of land in eastern Iowa, exclusive of other tribal claims, that were ceded to the United States by the Sac and Fox Tribe of Indians in 1833, 1837 and 1838. After a trial before the Indian Claims Commission, at which petitioners contended that the land was worth between $2.50 and $3.00 per acre and the government contended that the value was in the range of $0.43 to $0.80 per acre, the Commission concluded that the tract ceded in 1833 was worth $0.90 per acre, that the tract ceded in 1837 was worth $1.25 per acre, and that the tract ceded in 1838 was worth $1.10 per acre (Pet. App. 31, 37). These factual determinations, which were affirmed by the Court of Claims without dissent (Pet. App. 2), warrant no further review.

1. In the 1962 trial on the issue of land value, petitioners presented two expert witnesses who submitted a joint report and testified concerning their valuation of the three tracts and the method by which they had arrived at their conclusions. The experts relied essentially upon a so-called "bona fide market" approach, whereby the value of the land was determined not on the date of cession but rather as of the date when approximately 75 percent of the public lands in the area had passed into private ownership (Pet. App. 32). Since, as petitioners' experts conceded, a "bona fide market" did not exist for the eastern Iowa lands until many years after the cessions, the Commission rejected the petitioners' "novel" approach, stating (Pet. App. 32) that "it simply avoids the consequences of valuing the subject tracts as of the 1833-39 period."

In its findings of fact the Commission further explained its view of petitioners' "bona fide market" approach to valuation (Pet. App. 64-65):[1]

> Both [expert] witnesses, however, based their value conclusions on the existence of a "bona fide market" condition, a situation which both acknowledge did not exist as of the respective cession dates but theoretically was not reached in the cession areas until the early 1850's when approximately 75% of the available public land had passed into private hands. As a result both witnesses rely on the conditions affecting land values in eastern Iowa that existed from 15 to 20 years after the subject areas were ceded to the United States. * * *

[1]The Commission also noted that even if petitioners' data concerning private sales in the ceded area had been relied upon, they would not have supported petitioners' value conclusions (Pet. App. 35-36), and that petitioners' expert witnesses had failed to consider the difference between what a buyer would willingly pay for a 70-acre farm and for tracts of 217,600 acres, 1,189,000 acres, and 5,350,400 acres (Pet. App. 36).

> While the petitioners' experts did use private sales data in their computations, the Commission finds the "bona fide market" approach upon which their fair market value conclusions were based is unacceptable and not responsive to the economic, political and other conditions that would have influenced and controlled a land market in eastern Iowa as of the effective cession dates for the three subject tracts. * * * In the Commission's judgment the petitioners' experts ultimate conclusions on the value of the three subject tracts as of their respective cession dates are unrealistic and not supported by substantial evidence.

Having rejected the petitioners' approach, the Commission proceeded to value the land in question by weighing a number of physical, political, and economic factors (Pet. App. 33-35). Most important in this valuation was the abundance throughout the cession period of a vast amount of public land in neighboring areas that had been offered for sale at the uniform price of $1.25 per acre (Pet. App. 35).[2] For each of the three tracts, the base price of $1.25 was augmented or diminished by considerations that a prospective private purchaser of that tract or a portion thereof would have taken into account (Pet. App. 33-35).

Upon petitioners' appeal of the Commission's 1969 decision, the Court of Claims remanded the case to the Commission for "more specific findings and reasoning as to the valuations adopted" (Pet. App. 19-27). On remand, the petitioners—some 10 years after trial—suggested for the first time that the record was incomplete and attempted

[2]Petitioners' experts repeatedly acknowledged the depressing effect on land values in eastern Iowa of the enormous supply of available public land nearby (Pet. App. 32-33, n. 4).

to introduce evidence of sales outside eastern Iowa that were contemporaneous with the three cession dates. Two attempts by petitioners to submit such further evidence were denied. In its decision on remand, the Commission explained in detail the process by which it had arrived at its earlier conclusions of value (Pet. App. 3-18). On appeal for the second time, the Court of Claims affirmed (Pet. App. 2), and petitioners' motions for rehearing *en banc* were denied (Pet. App. 1).

2. The Court of Claims correctly affirmed the Commission's decision on remand. In the Commission's opinion (Pet. App. 8-12), it explained at great length, to the satisfaction of the Court of Claims, how it had determined the land values. These findings of fact on an exceedingly difficult issue not subject to mathematical exactness—the value more than a century ago of enormous tracts of undeveloped territory—were reached in a reasonable and logical manner and in full conformity with applicable legal principles, and there is thus no basis for disturbing the findings.

The Commission's decision is not in conflict with *Sinclair Refining Co.* v. *Jenkins Petroleum Co.*, 289 U.S. 689, where the absence of a provable market value at the time of a breach pertaining to a unique, patented item led the Court to permit discovery of hindsight evidence of value. In *Sinclair*, no credible evidence was in existence at the time of breach by which to assess the fair value of the patent. Here, on the other hand, the trier of fact had sufficient relevant, contemporaneous evidence, such as the sale price during the 1830's of adjoining public land, the location of the tracts, the quality of the soil, the degree of political organization in the area, and the climate, to support a determination of value. The Commission on remand was of

the view that the record as it existed was adequate and that a reopening of the trial was not necessary,[3] and that decision was not an abuse of discretion.

3. The Commission's ruling worked no change in the law so as to require receipt of new or additional evidence. Petitioners argue to the contrary (Pet. 23-25), relying on *Chevron Oil Co.* v. *Huson*, 404 U.S. 97.

Chevron discusses the factors that the Court has considered in determining whether to apply a new principle of law to a litigant who has acted in reliance upon a prior doctrine. The 1969 ruling of the Commission, however, neither overruled past precedent on which petitioners had relied nor constituted a decision on an issue of first impression, the resolution of which had not been clearly foreshadowed. On the contrary, the Commission's decision in this case to adopt a method of valuation that was not based upon contemporaneous private sales data in other areas follows a precedent established in 1955 in *Otoe and Missouria Tribe of Indians* v. *United States*, 131 F. Supp. 265, certiorari denied, 350 U.S. 848.[4]

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[3]The Court of Claims' remand in 1971 was solely for the purpose of eliciting more specific findings on the evidence already received and did not mandate—nor did petitioners then seek—a reopening of the trial for reception of additional evidence or new theories of valuation. Indeed, the Commission on remand twice ruled that the record was sufficient for a determination of value, and its thorough analysis of the value question demonstrates the substantiality of the evidence.

[4]This approach was reiterated in *United States* v. *Emigrant New York Indians*, 177 Ct. Cl. 263, and is often referred to as the "Emigrant New York Indian" valuation method. Contrary to petitioners' assertion (Pet. 11, 13-14), the Commission did not acknowledge any inconsistency between its use of private sales data in valuing the central Iowa lands and the eastern Iowa lands. Rather, the Commission explained the consistency between its two decisions at length (Pet. App. 12-13).

In rejecting sales remote in time from the valuation date, the Commission acted in accordance with its 1959 decision in *Delaware Tribe of Indians* v. *United States,* 8 Ind. Cl. Comm. 150, 185-186. The *Delaware Tribe* decision establishes that the Commission will determine the probity of hindsight evidence based upon circumstances revealed by the record as a whole. Here, the Commission—which must be accorded wide discretion in weighing the evidence—concluded that the evidence of sales subsequent to the date of cession was unpersuasive because of the significant differences in demographic, political and economic conditions that had occurred during the intervening period. Thus, the Commission's decision did not depart from settled valuation precedents.

4. Petitioners made no attempt to introduce additional evidence until 1972, despite the fact that their so-called "new evidence" (sales outside the cession area at the date of taking) was as available for use in the 1962 trial as in 1972. Before neither the Commission nor the Court of Claims did petitioners assert a change in the law or raise a constitutional question as grounds for receipt of their additional evidence.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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